

**Exhibit E – Transcript of Bench Decision, Dec. 16, 2009**  
**Adv. Proc. No. 09-01480 [docket no. 22]**

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555 (JMP)

Adv. Case No. 08-01420 (JMP) (SIPA)

Adv. Case No. 09-01480

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- - - - -x

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff-Appellant,

-against-

LEHMAN BROTHERS INC.,

Defendant.

- - - - -x

PT BANK NEGARA Indonesia (PERSERO) TBK,

Plaintiff,

-against-

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

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U.S. Bankruptcy Court  
One Bowling Green  
New York, New York

December 16, 2009  
10:02 AM

B E F O R E:  
HON. JAMES M. PECK  
U.S. BANKRUPTCY JUDGE

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HEARING re Fee Committee Final Recommendations for Second  
Interim Applications

HEARING re LBHI's Motion for Authorization to Make a Capital  
Contribution to Aurora Bank

HEARING re Debtors' Motion for Approval of a Settlement  
Agreement Among Lehman Brothers Special Financing Inc.,  
American Family Life Assurance Company of Columbus, and Others,  
Relating to Certain Swap Transactions with Beryl Finance  
Limited

HEARING re Motion of The TAARP Group, LLP Authorizing and  
Directing Immediate Payment of an Administrative Expense Claim

HEARING re Motion of Deutsche Bank AG to Permit Late Claim  
Filing Pursuant to Federal Rule of Bankruptcy Procedure  
9006(b)(1)

HEARING re Debtors' Motion Pursuant to Rule 1015(b) of the  
Federal Rules of Bankruptcy Procedure Requesting Joint  
Administration of Merit, LLC's Chapter 11 Case

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HEARING re Debtors' Motion for a Determination that Certain  
Orders and Other Pleadings Entered or Filed in the Chapter 11  
Cases of Affiliated Debtors be Made Applicable to the Chapter  
11 Case of Merit, LLC

HEARING re Debtors' Motion Pursuant to Bankruptcy Rule 1007(c)  
to Extend the Time to File Merit LLC's Schedules, Statements of  
Financial Affairs, and Related Documents

HEARING re Motion of California Public Employees Retirement  
System for Relief from the Automatic Stay

HEARING re Motion of Banesco Banco Universal Requiring Lehman  
Brothers Holdings Inc. to Provide Requested Information and to  
Deem Claim to be Timely Filed by the Securities Programs Bar  
Date

HEARING re Motion of Pacific Life Insurance Company to File  
Proof of Claim After Claims Bar Date

HEARING re Motion of PB Capital to Include Certain European  
Medium Term Notes in the Lehman Program Securities List or,  
Alternatively, to Deem Such Claims to be Timely Filed by the  
Securities Programs Bar Date

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HEARING re Debtors' Motion for Authorization to Implement the  
Derivatives Employee Incentive Program

HEARING re Debtors' Motion for an Order Approving Settlements  
with Bamburgh Investments (UK) Ltd. and Corfe Investments (UK)  
Ltd.

HEARING re Debtors' Motion for an Order Modifying the Automatic  
Stay to Allow Settlement Payment Under Directors and Officers  
Insurance Policies

HEARING re Motion of Merrill Lynch International for Relief  
from the Automatic Stay

HEARING re Motion of Malayan Banking Berhad for Examination of  
Debtors Under FRBP 2004

SECURITIES INVESTOR PROTECTION CORPORATION PROCEEDINGS:

HEARING re Motion for Order Approving Trustee's Allocation of  
Property of the Estate

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HEARING re California Public Employees Retirement Systems'  
Motion for Relief from the Automatic Stay to Effect Setoff  
against LBI Funds Currently Held by Securities Finance Trust  
Company

PRE-TRIAL CONFERENCE re PT Bank Negara Indonesia (Persero) Tbk  
v. Lehman Brothers Special Financing,  
Inc.

HEARING re Motion to Compel Production of Documents from the  
Trustee and the Committee Based on Privilege Waiver filed by  
Hamish Hume on behalf of Barclays Capital, Inc.

HEARING re Motion of Official Committee of Unsecured Creditors  
of Lehman Brothers Holdings Inc., et al. for Letters of Request  
for International Judicial Assistance

Transcribed by: Clara Rubin

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1 appropriate. Anything more?

2 MR. TECCE: Your Honor, I do have just one point and I  
3 apologize for this. In one of their requested documents we had  
4 misstated a date, Number 5, of the FSA's request. The date  
5 should be 19 September instead of 22 September. So if we --  
6 when we submit a form of order to the Court electronically, we  
7 were going to make that change.

8 THE COURT: If it's simply changing a typographical  
9 error I assume there's no controversy.

10 MR. THOMAS: No, Your Honor.

11 THE COURT: Fine.

12 MR. TECCE: Thank you very much, Your Honor.

13 THE COURT: There are three matters from this  
14 morning's calendar that I adjourned to the afternoon, so  
15 anybody who wants to come up to hear the bench ruling Banesco  
16 Banco Universal and PB Capital, this is a time to do that.

17 (Pause)

18 THE COURT: It's lonely up here.

19 UNIDENTIFIED SPEAKER: I represent Pacific Life; it's  
20 very lonely up there.

21 THE COURT: The Court will read into the record a  
22 ruling with respect to the late filed claims of Banesco Banco  
23 Universal and PB Capital. As I indicated during this morning's  
24 calendar, I've given active consideration to the Pacific Life  
25 Insurance Company matter which is of a somewhat similar nature

1 but with some distinguishing facts and I'm simply not ready to  
2 rule with respect to Pacific Life.

3 Like many aspects of the Lehman bankruptcy,  
4 establishing a bar date in these cases was an unusually complex  
5 exercise. The debtors' bar date motion at Docket Number 3654  
6 was contested by a multitude of parties including the holders  
7 of certain debt securities issued by or guaranteed by the  
8 debtors. These objectors questioned the requirement that they  
9 file both proofs of claim and guarantee questionnaires.  
10 Ultimately, the parties reached an agreement and the Court  
11 entered the bar date order at Docket Number 4271 establishing  
12 two separate deadlines. The general bar date for claims, which  
13 is September 22, 2009, and a later date known as the securities  
14 bar date on November 2, 2009 for claims identified on the final  
15 version of the Lehman Programs Securities List as of July 17,  
16 2009 at 5 p.m.

17 The bar date order specified that only those  
18 securities in the final version of the Lehman Programs  
19 Securities List would be entitled to the later bar date. The  
20 Lehman Programs Securities List was the result of a  
21 collaborative process that ultimately produced a final version  
22 of that list setting forth 6,744 securities that were subject  
23 to the later securities bar date. But importantly for the  
24 current dispute, this list did not include Banesco's or PB  
25 Capital's securities. The Lehman Programs Securities List

1 never included the claim of Pacific Life.

2 Bankruptcy Rule 3003(c) allows the bankruptcy court to  
3 set a bar date after which proofs of claim may not be filed.  
4 Bankruptcy Rule 9006(b)(1) gives a bankruptcy court discretion  
5 to enlarge the time to file claims where the failure to act was  
6 the result of excusable neglect.

7 Excusable neglect is an equitable determination that  
8 requires consideration of all relevant circumstances  
9 surrounding a claimant's omission. Pioneer Investor (sic)  
10 Services v. Brunswick Associates, LP 507 U.S. 380 at 395 (1993)  
11 is the leading case in this area. The Pioneer Court noted four  
12 factors that should be considered in analyzing excusable  
13 neglect. These factors are: The danger of prejudice to the  
14 debtor, the length of the delay and its potential impact on  
15 judicial proceedings, the reason for the delay including  
16 whether it was in the reasonable control of the movant and  
17 whether the movant acted in good faith.

18 The Second Circuit has adopted what has been  
19 characterized as a hard line in applying this Pioneer test. I  
20 cite to the case of Midland Cogeneration Venture Limited  
21 Partnership v. Enron Corp. 419 F.3d 115 at 122 (2d Cir. 2005).  
22 This hard line focuses heavily on the reason for the delay and  
23 specifically whether the delay was in the reasonable control of  
24 the movant. The other factors which generally favor the party  
25 seeking the extension become more relevant in close cases. The



1 Court will apply these factors in considering each of the  
2 movant's circumstances. I'll start with Banesco.

3 On October 31, 2009, Banesco filed its motion seeking  
4 that this Court deem its claim timely filed under a theory of  
5 excusable neglect or add the Banesco note to the Lehman Program  
6 Securities list.

7 The Banesco claim is for a note in the amount of 15.5  
8 million dollars. The Banesco note is a structured security and  
9 is similar to many of the securities on the Lehman Program  
10 Securities list. Banesco believed that because of the nature of  
11 the Banesco note and its similarity to many of the securities  
12 listed on the Lehman Program Securities list, including three  
13 other securities Banesco owned that were included on the final  
14 list, it too was subject to the November 2, 2009 securities bar  
15 date. However, this particular security was not on the list  
16 and any claim for that note had to be filed by September 22,  
17 2009. Banesco filed a proof of claim for the Banesco note  
18 prior to the securities bar date.

19 The debtors, joined by the official creditors'  
20 committee, object to Banesco's motion. The debtors challenge  
21 Banesco's assertion of excusable neglect and argue that Banesco  
22 and its counsel were aware of the Lehman Program Securities  
23 list and that the bar date order clearly provided that only  
24 securities on the final version of that list were subject to  
25 the securities bar date. The failure to timely file was simply

1 a failure to follow the directions relevant to the bar date  
2 order.

3 The debtors concede that the length of delay in  
4 Banesco's late file claim is minimal and that there was no bad  
5 faith when it filed its motion. Accordingly, the Court will  
6 focus on prejudice and the reason for the delay.

7 The prejudice factor calls for consideration of the  
8 size of the claim in relation to the estate whether a  
9 disclosure statement or plan has been filed and the disruptive  
10 effect permitting the late claim would have on plan  
11 formulation. In re Keene Corp 188 B.R. 903 at 910 (S.D.N.Y  
12 1995).

13 I this case, each of the prejudice factors favor  
14 Banesco. The claim of 15.5 million dollars is objectively  
15 large, but in reality is an insignificant percentage of the  
16 total claims filed against the debtors. The debtors are not  
17 ready to file a plan or disclosure statement and allowing this  
18 claim will not disrupt the plan formulation process. Moreover,  
19 the claim in question was filed before the November 2nd  
20 deadline for listed securities claims.

21 The debtors also assert that allowing claims such as  
22 Banesco's will result in the proverbial flood of similar late  
23 claims. This is not a foreseeable risk. Banesco believed,  
24 incorrectly as it turns out, that its claim was subject to the  
25 securities bar date. It filed a proof of claim before that

1 date. This fact alone distinguishes it from other late filed  
2 claims and the class of other claimants that could make a  
3 similar credible plea for the exercise of discretion by the  
4 Court must be an extremely limited group of potential  
5 creditors. The Court therefore finds that the prejudice factor  
6 weights in favor of Banesco.

7 The reason for the delay is the most important factor  
8 in this circuit. In re Enron 419 F.3d at 122. A creditor  
9 seeking to file a late claim must explain the circumstances  
10 surrounding the delay in order to supply the Court with  
11 sufficient context to fully and adequately address the reason  
12 for delay factor and the ultimate determination of whether  
13 equities support the conclusion of excusable neglect. In re  
14 Enron Creditors Recovery Corp. 370 B.R. 90 at 103 (S.D.N.Y.  
15 2007) citing to Pioneer.

16 Here, Banesco claims that it wrongly believed that the  
17 Banesco note was subject to the securities bar date. Banesco  
18 attached to its motion a declaration by its counsel, the  
19 attorney who was responsible for filing its proof of claim who  
20 indicated his reasons for the mistake. The Banesco note was a  
21 structured security that is similar to many of the securities  
22 on the Lehman Program Securities list. Additionally, the  
23 Banesco note did not have a CUSIP or ISIN number that would  
24 assist in identifying whether it was one of the many thousands  
25 of securities subject to the later bar date.

1           The bar date order established two different bar dates  
2           for different types of claims. The reason for Banesco's delay  
3           is not merely a failure to comply with a clear bar date or a  
4           simple missed deadline situation, Banesco neglected to  
5           determine the proper bar date for the Banesco note but acted  
6           properly based on its own erroneous beliefs. The reason for  
7           the delay does fall on Banesco to some extent. But the  
8           complexity of the claims, the dual nature of the bar dates  
9           here, the international aspects of these cases all mitigate  
10          responsibility for the error.

11          The decision to permit a late file claim is ultimately  
12          based on equity. Guided by the Pioneer court and the Second  
13          Circuit's ruling in In re Enron, the equities here favor  
14          deeming Banesco's claim timely filed. There is minimal, if  
15          any, prejudice to the debtors and no appreciable risk of a  
16          multitude of similarly situated claims. There is no issue  
17          regarding the length of the delay or Banesco's good faith. And  
18          while the reason for the delay may be chargeable more to  
19          Banesco than to any other party, the relief afforded by Rule  
20          9006(b)(1) exists for this very type of circumstance.  
21          Accordingly, a balancing of the equities favors Banesco and the  
22          Banesco proof of claim will be deemed timely. I'll next turn  
23          to PB Capital.

24          On October 22, 2009, PB capital filed its motion  
25          seeking to have this Court deem four if its claims timely filed

1 under a theory of excusable neglect or to add the PB securities  
2 to the final version of the Lehman Program Securities list.

3 The PB Capital claims are for four securities totaling  
4 270 million dollars. The PB securities are a series of  
5 financial guarantee linked notes due in 2/20/27 that were  
6 issued under the Euro Medium Term Note Program. Like the  
7 Banesco note, the PB securities are similar to many of the  
8 securities in the Lehman Program Securities list. In fact, the  
9 PB securities were included on the initial version of that list  
10 on July 6, 2009 but were removed from the final version of that  
11 list published on July 17, 2009. Accordingly, because the  
12 securities were not on the list as of July 17, 2009, the PB  
13 securities were not eligible for the later bar date.

14 PB Capital asserts that it believed the PB securities  
15 were on the final version of the Lehman Program Securities list  
16 and would be subject to the later securities bar date. PB  
17 Capital did not file a timely proof of claim prior to the  
18 general bar date, but did file a proof of claim on or before  
19 the securities bar date.

20 The debtors objected to PB Capital's motion on  
21 substantially the same grounds as they did for the Banesco  
22 motion. The debtors challenge PB Capital's assertion of  
23 excusable neglect mirroring their objection to Banesco. They  
24 argue that PB Capital and its counsel were aware of the initial  
25 and final versions of the Lehman Program Securities list and

1 that the bar date order clearly provided that only securities  
2 on the Lehman Program Securities list were subject to the  
3 securities bar date. The failure to timely file was simply a  
4 failure to check the final list and follow the plain directions  
5 of the bar date order. The debtors again concede that the  
6 length of delay and PB Capital's late filed claim is minimal  
7 and that there was no bad faith when it filed its motion.

8 For substantially the same reasons applicable to  
9 Banesco, the equities favored deeming PB Capital's claim timely  
10 filed. There is minimal prejudice because PB Capital timely  
11 filed its claim prior to what it believed was the correct bar  
12 date.

13 Turning to the reason for the delay, PB Capital's  
14 claim is, perhaps, even more compelling than Banesco's. The PB  
15 securities were on the initial version of the Lehman Program  
16 Securities list. And while it is not disputed that they were  
17 removed from the final version two weeks later, PB Capital's  
18 mistake is understandable.

19 Permitting these claims will result in no prejudice to  
20 the debtors and no foreseeable risk of multiple similar late  
21 filed claims. The length of delay was minimal and there was no  
22 bad faith. As in Banesco's case, PB Capital is responsible for  
23 the error but it is not the result of mere inattention or  
24 inadvertence. PB Capital failed to pay enough close attention  
25 to changes made in the list of the securities. On balance, the

1 equities favor PB Capital and accordingly the PB security --  
2 the PB Capital proof of claim will be deemed timely filed.  
3 That's the ruling of the Court.

4 On the Pacific Life motion which was heard at the same  
5 time, I guess the troublesome news is that I haven't been able  
6 to reach the same result and I'm not sure what result I'm going  
7 to reach or when I'm going to reach it. Suffice it to say,  
8 that in exercising judgment here and attempting to apply the  
9 strict Pioneer factors as recently interpreted in the Second  
10 Circuit, the so-called hard line approach, it becomes more  
11 difficult but not yet impossible for me to find that the delay  
12 is properly excusable. As to that matter, it will continue to  
13 be under advisement and at an appropriate I'll advise counsel  
14 when I'll be prepared to make a ruling.

15 I believe that concludes today's calendar unless  
16 there's anything more?

17 UNIDENTIFIED SPEAKER: Your Honor, would it be  
18 allowable or okay if I spoke just for a moment on Pacific Life  
19 or is this not the time and place? Less than two minutes but  
20 if this is not the time and place then I'll hold off.

21 THE COURT: I think it's not the time and place.

22 UNIDENTIFIED SPEAKER: Fine.

23 MR. LEMAY: Your honor, David LeMay from Chadbourne &  
24 Parke for Banesco. Of course, thank you. I rise only to say  
25 we have an order, if the Court desires it or we can submit it

1 electronically, I just didn't want to walk out of here without  
2 taking care of that. The form of order we did have to revise  
3 slightly to take out some surplus language that was in the form  
4 that we filed with the motion. If Your Honor would like me to  
5 hand it up I can do that, I can send it along; whatever the  
6 Court would likely be guided by.

7 THE COURT: Well, the bench ruling sort of stands for  
8 itself but I will entertain orders both from counsel for  
9 Banesco and counsel for PB Capital and suggest that those be  
10 submitted to chambers.

11 MR. LEMAY: We'll do that, Your Honor.

12 THE COURT: Okay. Thank you. We're adjourned.

13 (Proceedings concluded at 3:39 PM)

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